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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL SANTILLAN LOPEZ, Defendant and Appellant.	B209515 (Los Angeles County Super. Ct. No. PA054272)

APPEAL from a judgment of the Superior Court of Los Angeles County. Harvey Giss, Judge. Affirmed.

Doris M. Frizzell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Michael Santillan Lopez, a convicted felon, guilty of multiple crimes stemming from a high-speed car chase. The jury also found true the special gang and weapons allegations against defendant. The trial court sentenced defendant to 114 years to life in state prison. On appeal, defendant claims the trial court erred in (i) modifying the willfulness, deliberation and premeditation jury instruction for attempted murder, (ii) admitting evidence of his prior convictions, and (iii) ordering the sentences on counts one (attempted murder) and four (evading a peace officer) to run consecutively. Defendant also asks that we review the trial court's in camera *Pitchess* proceeding.

We conclude the trial court did not err. Accordingly, we affirm.

Background

Defendant was arrested in the evening of January 9, 2006 following a high-speed car chase through the streets of Sylmar. At trial, various witnesses testified that they saw the car chase, which involved California Highway Patrol Officer Francisco Vargas in his CHP car, with its siren and oscillating and "wig-wag" lights on, pursuing a Toyota Camry with two individuals inside. At one point during the chase, Officer Vargas lost sight of the car after it had turned a corner. When Officer Vargas followed around the same corner, he was surprised to see that the Camry had slowed down. He also heard what sounded like three gun shots nearby. Officer Vargas then saw the individual in the front passenger side of the Camry lean out the car window with his arm extended in the direction of Officer Vargas. He heard another three gun shots and saw three muzzle flashes coming from the arm extending out from the Camry's window. The Camry eventually hit two other vehicles and crashed into a pole in front of a Jack In The Box restaurant, where the Camry came to a stop. Two individuals got out of the car and ran in different directions. Officer Vargas saw the front passenger door of the Camry open and one suspect standing immediately next to the open door "pocket." Officer Vargas chased and apprehended that suspect, who was wearing a Dallas Cowboys jersey bearing the number "8" and who was identified as defendant. The other suspect, later identified as

Edward Alcala, was dressed in black, jumped over a fence, and was found later that night hiding in a nearby backyard.

Multiple law enforcement officers responded to Officer Vargas's calls on the radio. At the crash scene, two California Highway Patrol Officers saw a .45-caliber pistol on the passenger-side floorboard of the crashed Camry and a rifle sticking out of a blue bag on the street nearby. Los Angeles Police Department Officers Cesar Larios and Alonso Menchaca also responded to the scene and assisted in apprehending defendant near the Jack In The Box. Officer Larios conducted a full search of defendant, during which the officer found a vial, cellular telephone and .45-caliber round in defendant's pants pockets. Officer Larios handed those items to another officer, who was standing nearby watching the search. Officer Larios also found a wallet near the crash site, which contained identifying information for both defendant and Alcala.

Later that night, defendant submitted to a gun residue test, which was negative. During a search of the Camry, the Los Angeles Police Department uncovered various ammunition that fit the .45-caliber pistol and the rifle recovered at the crash scene. After DNA and fingerprints from the Camry were analyzed, it was found that neither defendant's DNA nor fingerprints were among those taken from the Camry.

Defendant went to trial on charges of willful, deliberate and premeditated attempted murder of a peace officer (§§ 664 and 187, subd. (a)),[1] assault on a peace officer with a semi-automatic firearm (§ 245, subd. (d)(2)), evading a peace officer (Veh. Code, § 2800.2, subd. (a)), possession of a firearm by a felon (§ 12021, subd. (a)(1)), carrying a loaded firearm (§ 12031, subd. (a)(1)), and possession of ammunition (§ 12316, subd. (b)(1)).[2] The following gang and weapon enhancements were also alleged: as to counts one through three, defendant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and a principal personally used a firearm (§ 12022.53, subds. (b) and (e)(1)); as to count three, defendant personally used a firearm

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[1] Unless otherwise noted, all section references are to the Penal Code.

[2] Edward Alcala was charged in the information as a co-defendant. He plead guilty before trial and is not a party to this appeal.

(§ 12022.53, subd. (b) and § 12022.5, subds. (a) and (d)); as to count seven, defendant was an active participant in a street gang (§ 12031, subd. (a)(2)(C)); and as to counts one through eight, the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(A) [counts four through eight] and (C) [counts one through three]). It was also alleged that defendant suffered prior convictions of serious or violent felonies or juvenile adjudications. (§ 1170.12, subds. (a) through (d); § 667, subds. (b) through (i); § 667.5, subd. (b).)

At trial, Los Angeles Police Department Detective Efren Gutierrez testified as a gang expert. Detective Gutierrez testified that the primary criminal activities of the San Fer gang included murders, attempted murders, assaults with deadly weapons and robberies. He testified that the "ultimate crime" for a gang member would be killing, or trying to kill, a law enforcement officer. He discussed a series of crimes committed by San Fer members, including defendant's brother, who was convicted on two counts of voluntary manslaughter. Detective Gutierrez also testified about defendant's prior convictions—assault with a deadly weapon resulting in great bodily injury and attempted robbery. Although Detective Gutierrez gave no details about defendant's conviction for attempted robbery, he explained that defendant's prior assault conviction involved the stabbing of a rival gang member. At the time of defendant's arrest in this case, he was wanted for violation of his parole stemming from a previous felony conviction.

Detective Gutierrez also testified about defendant's numerous tattoos. He explained that many of the tattoos signified defendant's membership in the San Fer gang. For example, a tattoo on the back of defendant's head showed his moniker ("Little Mikey") and the San Fer clique to which he belonged ("Los Jokers"). The detective testified that The Jokers clique was considered the most active San Fer group and included the gang's rule makers. Detective Gutierrez opined that, based on the amount and placement of defendant's tattoos, defendant was not only a proud member of the San Fers, but was a "hardcore" member who lives and dies for the gang, is not afraid of law enforcement or being arrested, and would kill for the gang.

Defendant did not testify at trial. His attorney argued that defendant was not in the Camry that crashed in front of the Jack In The Box. In essence, counsel argued that defendant was in the wrong place at the wrong time. Defense counsel claimed that defendant fled the scene after the car crash not because he was involved in the car chase, but because he did not want to get caught for violating his parole.

The jury found defendant guilty on all charges and found all allegations true. The trial court sentenced defendant to a total of 114 years to life in state prison. Over defendant's objection, the trial court ordered the sentences on counts one (attempted murder) and four (evading a peace officer) to run consecutively. On appeal, defendant argues instructional, evidentiary and sentencing errors. He also asks this court to review the trial court's in camera *Pitchess* proceeding.

Discussion

1. CALCRIM 601

The trial court used a modified version of CALCRIM 601 to instruct the jury on willfulness, deliberation and premeditation with respect to attempted murder. In relevant part, the court instructed the jury as follows (the modifications are italicized): "If you find the defendant guilty of attempted murder under Count 1, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. The defendant *or Edward Alcala* acted willfully if he intended to kill when he acted. The defendant *or Edward Alcala* deliberated if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant *or Edward Alcala* premeditated if he decided to kill before acting. The attempted murder was done willfully and with deliberation and premeditation if either the defendant or *Edward Alcala* or both of them acted with that state of mind." The jury instructions were discussed in large part off the record. Defendant made no objection to this modified instruction on the record.

Defendant claims this modified CALCRIM 601 improperly allowed the jury to find the attempted murder was willful, premeditated and deliberate based on either defendant's or Alcala's state of mind. Defendant contends he cannot be guilty of willful, premeditated and deliberate attempted murder unless the jury found *he* acted willfully with premeditation and deliberation. We disagree.

In *People v. Lee* (2003) 31 Cal.4th 613 (*Lee*), our Supreme Court considered "the proper interpretation of section 664(a) as to the attempted murderers to whom it applies." (*Id.* at p. 621.) The Court held "as a substantive matter section 664(a) requires only that the *murder attempted* was willful, deliberate, and premeditated for an attempted murderer to be punished with life imprisonment. To quote the language of section 664(a), 'if the crime attempted is willful, deliberate, and premeditated murder . . . , the person guilty of that attempt shall be punished by imprisonment . . . for life . . . .' Thus, section 664(a) states *only* that the murder attempted must have been willful, deliberate, and premeditated, *not* that the attempted murderer *personally* must have acted willfully and with deliberation and premeditation. Put otherwise, section 664(a) states that if the murder attempted was willful, deliberate, and premeditated, any 'person *guilty of that attempt*'—*not* confined to persons *who acted willfully and with deliberation and premeditation*—'shall be punished by imprisonment . . . for life.'" (*Id.* at pp. 621-622.) The Court continued, explaining that "section 664(a) does not require that an attempted murderer personally act with willfulness, deliberation, and premeditation. It requires only that the attempted murder itself was willful, deliberate, and premeditated." (*Id.* at p. 626.) The Court concluded "that section 664(a) properly must be interpreted to require only that the murder attempted was willful, deliberate, and premeditated, but not to require that an attempted murderer personally acted with willfulness, deliberation, and premeditation, even if he or she is guilty as an aider and abettor." (*Id.* at p. 627.)

CALCRIM 601 as modified here is consistent with section 664, subdivision (a). The instruction made clear that the murder attempted had to be willful, premeditated and deliberate. As also required by section 664, subdivision (a), the amended information

against defendant alleged that the offense was willful, deliberate and premeditated. And the jury found that allegation true.

Defendant argues *Lee* does not apply here because, in *Lee*, the Court was addressing the application of section 664, subdivision (a) to an accomplice. Defendant asserts the jury here determined that defendant was the "direct perpetrator" of the attempted murder and, therefore, *Lee* does not apply. We are not persuaded. First, *Lee* held "as a substantive matter" that section 664, subdivision (a) "requires only that the *murder attempted* was willful, deliberate, and premeditated for an attempted murderer to be punished with life imprisonment." (*Lee*, *supra*, 31 Cal.4th at pp. 621-622.) Second, for his position, defendant relies on *People v. McCoy* (2001) 25 Cal.4th 1111 (*McCoy*). But, *McCoy* was decided before *Lee* and does not address section 664. Thus, *McCoy* is unhelpful.

2. Evidence of Defendant's Prior Convictions

Defendant argues the trial court abused its discretion when it admitted evidence of defendant's prior convictions. We review the trial court's evidentiary rulings for an abuse of discretion. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

a. Evidence Code Section 1101

Evidence Code section 1101 prohibits the admission of character or propensity evidence "when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a) (section 1101).) Section 1101 does not prohibit, however, "the admission of evidence that a person committed a crime . . . when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, *knowledge*, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b), italics added.)

Defendant was charged in count seven with carrying a loaded firearm while being an active participant in a criminal street gang in violation of section 12031, subdivisions (a)(1) and (a)(2)(C). In order to convict on this count, the prosecution had to prove

beyond a reasonable doubt not only that defendant actively participated in a criminal street gang, but also that he knew the gang engages in or has engaged in a pattern of criminal gang activity. Although the prosecution offered to stipulate that defendant knew of the gang's criminal activities, defendant refused to do so. Defense counsel also argued in closing that street gangs are not necessarily criminal street gangs. In light of the defense strategy, the prosecution had no choice but to prove up defendant's active participation in the gang and knowledge of the gang's pattern of criminal activities.

On appeal, defendant claims there was no real dispute that he is a San Fer gang member. Indeed, that fact is fairly obvious. For example, the amount and types of tattoos on defendant's body broadcast the fact that he is a member of the San Fer gang. But, as noted above, gang membership alone was not enough to convict on count seven. The prosecution also had to prove defendant knew the gang engaged in or had engaged in a pattern of criminal activity.

The evidence of defendant's prior convictions was extremely relevant and probative on this disputed element of the crime (i.e., whether defendant had knowledge of the San Fer gang's pattern of criminal activities). The prosecution presented ample evidence of both the San Fer gang's pattern of criminal activities and defendant's membership in the gang, all of which served as circumstantial evidence of defendant's knowledge of the gang's pattern of criminal activities. However, the evidence of defendant's prior convictions served as direct evidence of his knowledge of the gang's criminal activities. For example, defendant's 1991 conviction for assault with a deadly weapon demonstrated his active participation in criminal activity related to a rivalry between San Fer and another gang. In addition, defendant's prior assault conviction as well as his 1998 conviction for attempted robbery both demonstrated his participation in crimes that Detective Gutierrez testified were some of the San Fer gang's primary criminal activities. Thus, such evidence was relevant and admissible under section 1101, subdivision (b) to prove defendant's direct knowledge of the San Fer gang's pattern of criminal activities.

b. Evidence Code Section 352

Even when evidence of a prior conviction may be admitted under subdivision (b) of section 1101, however, admission of that evidence must still comport with other policies limiting the admission of evidence, such as those contained in Evidence Code section 352. (*People v. Thompson* (1988) 45 Cal.3d 86, 109.) Evidence Code section 352 provides that the trial court may exercise its discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The trial court ruled that the evidence of defendant's prior convictions was highly probative and not unduly prejudicial. The trial court stated "[a]s far as I am concerned, it's direct evidence from a witness that you need to prove an element of the offense so you don't leave yourself naked with sheer circumstantial evidence." We agree.

Although evidence of prior convictions can be inherently prejudicial (see *People v. Thompson* (1980) 27 Cal.3d 303, 318), we do not consider the prior conviction evidence here unduly prejudicial. For purposes of Evidence Code section 352, "prejudicial" is not synonymous with "damaging," but instead refers to evidence that uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues. (*People v. Kipp, supra,* 26 Cal.4th at p. 1121.) Defendant's prior convictions were for (i) assault with a deadly weapon and (ii) attempted robbery. Those convictions do not necessarily show that defendant had a propensity to commit the crime he was charged with here, which Detective Gutierrez opined to be the "ultimate crime that a gang member could commit." In addition, although Detective Gutierrez testified as to some details of defendant's assault conviction, those details were general in nature and tailored to explain that the assault was related to the San Fer gang's criminal activities (namely, an ongoing rivalry between the San Fer gang and another gang). Detective Gutierrez gave no details as to defendant's attempted robbery conviction. Thus, even assuming without deciding that the admission of defendant's prior convictions evoked some

emotional bias against defendant, we conclude any such prejudice would not have substantially outweighed the high probative value of that evidence. (Evid. Code, § 352.)

Similarly, we conclude the evidence of defendant's prior convictions was neither cumulative nor unduly confusing. Had the evidence of defendant's prior convictions been used to prove defendant's membership in the San Fer gang, such evidence would have been cumulative. As explained above, however, the prior convictions evidence was used to prove an essential element of count seven—defendant's knowledge of the San Fer gang's pattern of criminal activities. It was not cumulative on that point. Defendant relies on *People v. Leon* (2008) 161 Cal.App.4th 149 for the proposition that the prior conviction evidence was cumulative on the issue of his knowledge of the San Fer's criminal activities. *Leon* is distinguishable, however, because the prior conviction there was used to prove the defendant's membership in a gang. The court held there was ample evidence of his gang membership and the prior conviction was cumulative on that point. (*Id.* at p. 169.) As noted above, however, the prosecution here used defendant's prior convictions to prove knowledge under section 12031, subdivisions (a)(1) and (a)(2)(C), of which there was no other direct evidence.

Defendant does not argue that, because evidence of his prior convictions was admitted, the jury was misled or issues were confused. And we see no indication that the jury was somehow confused or misled by the evidence of defendant's prior convictions. The trial court instructed the jury with CALCRIM 1403, which limited the jury's consideration of evidence of defendant's gang activity to (i) whether defendant acted with the intent, purpose and knowledge required to prove the gang-related crimes and enhancements, (ii) whether the defendant had a motive to commit the crimes charged, and (iii) whether witnesses were credible. The jury was instructed not to consider evidence of gang activity for any other purpose, including that the defendant is a person of bad character or that he is disposed to commit crime. Thus, to the extent there was any prejudicial impact from the admission of defendant's prior convictions, it was negated by the court's limiting instruction. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1023.)

Accordingly, we conclude the trial court did not abuse its discretion in admitting evidence of defendant's prior convictions.

3. Sentencing on Counts One and Four

Defendant argues the trial court erred in ordering the sentences on counts one (attempted murder) and four (evading a peace officer) to run consecutively. We disagree.

a. Mandatory Consecutive Sentences

At the sentencing hearing, the trial court agreed with the prosecution that section 667, subdivision (c)(6) required consecutive sentences on counts one and four. Defendant argues consecutive sentences were not mandatory on counts one and four because the two offenses (attempted murder and evading a peace officer) occurred on the same occasion and involved the same operative facts. Section 667, subdivision (c)(6) provides that "[i]f there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to [this section]." In *People v. Lawrence* (2000) 24 Cal.4th 219, 223 (*Lawrence*), our Supreme Court explained that "[b]y implication, consecutive sentences are not mandated under subdivision (c)(6) . . . if all of the current felony convictions are either 'committed on the same occasion' or 'arise from the same set of operative facts.'"

We agree with defendant that the two offenses occurred on the same occasion. While evading the peace officer, defendant attempted to murder the officer. This is true despite the fact that the offense of evading an officer began before defendant attempted to kill the officer. The attempted murder took place during the course of evading the officer. (See *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1163 [evading police officers "was an uninterrupted single course of conduct, i.e., one continuous act of driving lasting 30 minutes"].) Because we conclude the offenses occurred on the same occasion, we need not consider whether they arose from the same set of operative facts. (*Lawrence, supra,* 24 Cal.4th at p. 227.) Accordingly, the trial court was not required to order consecutive sentences on counts one and four under subdivision (c)(6) of section 667.

b. Discretionary Consecutive Sentences

Importantly, however, the trial court had discretion to order consecutive sentences. (§ 669; *People v. Bradford* (1976) 17 Cal.3d 8, 20.) Defendant argues the trial court was not aware of its discretion to order consecutive sentences, but instead was under the mistaken impression that it was required to order consecutive sentences. As a result, defendant argues we must remand for resentencing so that the trial court can exercise its discretion in the first instance. The transcript of the sentencing hearing reveals, however, that the trial court was aware of its discretion to order consecutive sentences. At the hearing, the prosecutor made clear that "even if we were to assume for sake of argument it is the same set of operative facts, same occasion, this court still has the discretion to sentence consecutively. And I would suggest that based on this defendant's entire history, the nature of this case, the court certainly wouldn't be abusing its discretion in still imposing consecutive sentences." In response, the trial court stated: "I believe I have that discretion. The court of appeals may say otherwise. Whether they smile or frown upon the consecutive [sentences], we'll find out somewhere down the line." In light of the trial court's comments at the sentencing hearing, we conclude the court was aware of its discretion to order consecutive sentences on counts one and four and, in the alternative to mandatory consecutive sentences, exercised that discretion in ordering the sentences on counts one and four to run consecutively.

c. Section 654

Defendant also argues that, under section 654, the trial court was required to stay imposition of the sentence on count four. Section 654, subdivision (a), provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 prohibits multiple sentences when a defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct with a single intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) If defendant had multiple independent criminal objectives, however, he may be punished

for each offense even if the offense shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) We review a challenge under section 654 for substantial evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Defendant asserts his intent and objective underlying the attempted murder (count one) and evading a peace officer (count four) were the same—namely, to escape apprehension. We disagree. Substantial evidence supports a finding that, in addition to evading the officer, defendant also harbored the separate and independent criminal intent to kill the officer. The evidence showed defendant began shooting after the chase had begun, defendant aimed the shots in the direction of the officer, and, as a gang member, defendant's ultimate crime would be the killing of a law enforcement officer. Defendant's argument also ignores the jury's verdict. In addition to evading a peace officer, the jury found the requisite intent for attempted murder and found that defendant was the shooter. Thus, contrary to defendant's position, the crimes in counts one and four are not incident to a single intent and objective. Accordingly, we conclude section 654 does not apply to those counts.

4. *Pitchess*

Trial courts are granted wide discretion when ruling on a *Pitchess* motion. On appeal, we independently review the sealed records from the trial court's in camera hearing to determine whether the trial court abused its discretion in ruling on defendant's motion for disclosure of police personnel records. (*People v. Prince* (2007) 40 Cal.4th 1179, 1285.)

Defendant made a *Pitchess* motion claiming Officers Larios and Menchaca may have falsely attributed incriminating statements to defendant, may have planted evidence on defendant and failed to advise defendant of his *Miranda* rights. The trial court granted the motion to the extent it sought information related to complaints against Officers Larios or Menchaca alleging perjury or falsification or fabrication of evidence. The trial court then held an in camera hearing to review personnel records for Officers Larios and Menchaca, which the custodian of records for the City of Los Angeles had brought to the

hearing. The court stated for the record what documents it reviewed and generally what those documents revealed. The court concluded there were no discoverable materials as to either officer. We have independently reviewed the transcript under seal and conclude that the trial court did not abuse its discretion in ruling on defendant's *Pitchess* motion.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

FERNS, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.